

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: STATIC RANDOM ACCESS MEMORY (SRAM) ANTITRUST LITIGATION, _____ /	No. C 07-01819 CW ORDER DENYING INTEL CORPORATION'S MOTION FOR AN ENLARGEMENT OF TIME TO OPT OUT OF CLASS
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Intel Corporation moves for an order enlarging the time within which it may opt out of the certified class in this action. The Court established an opt-out deadline of April 6, 2009. Intel argues that it intended to opt out of the class but, through inadvertence, missed the deadline. Defendants have filed a joint statement of non-opposition to Intel's motion. Plaintiffs, through the law firm of Cotchett, Pitre & McCarthy, their lead counsel, filed a brief in opposition to Intel's motion. Having considered the papers filed by the parties, the Court denies Intel's motion.

BACKGROUND

On September 29, 2008, the Court certified the class of direct purchasers of SRAM. In order to exclude itself from the class, a party was to have done so in writing by April 6, 2009. Intel is a class member and is one of the largest purchasers of SRAM from

1 Defendants.¹ Intel claims that it intended to opt out of any
2 certified SRAM class pursuant to an agreement it had made with one
3 its suppliers, whom Intel does not identify. The claims
4 administrator, Rust Consulting, Inc., mailed seventy-two class
5 action notices to Intel at various addresses, including five to
6 Intel's corporate headquarters in Santa Clara, California. As of
7 June 25, 2009, the United States Postal Service had returned seven
8 of these direct mail notices as undeliverable without a forwarding
9 address. Rust was able to update six of those addresses, to which
10 it subsequently mailed notices. Two of those notices were again
11 returned as undeliverable. Thus, Plaintiffs' counsel asserts that
12 sixty-nine of the direct mail notices were actually received by
13 Intel.

14 Rust also sent thirty-one email notices to Intel at various
15 email addresses. Of those, four bounced back as undeliverable.
16 Thus, Plaintiffs' counsel asserts that twenty-seven of the email
17 notices sent to Intel were successfully delivered. Plaintiffs'
18 counsel also caused the Wall Street Journal to publish a notice
19 about the class action in its national edition on January 30, 2009.

20 Approximately forty-five individuals or entities timely
21 excluded themselves from the class. No other individual or entity
22 has requested an enlargement of the time to file a request for
23 exclusion.

24 Intel claims that its Santa Clara headquarters office received
25 only thirteen notices. According to Intel, the only notice that
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27 ¹Intel excluded itself from the class in the preceding DRAM
28 litigation. In re Dynamic Random Access Memory (DRAM) Antitrust
Litig., No. M 02-1486 PJH (N.D. Cal.).

1 arrived prior to the opt-out deadline was forwarded from an Intel
2 branch in Malaysia. The other twelve notices were forwarded from
3 Intel branches in Oregon, but those notices did not arrive until
4 May 28, 2009, after the opt-out deadline had already passed. Intel
5 claims that it did not receive any of the other mailed notices, or
6 any of the emailed notices.²

7 When the Malaysia notice arrived in the legal department in
8 Santa Clara, "through miscommunications, the deadline for opting-
9 out was not calendared." Motion at 2; see also Craycroft Decl.,
10 ¶ 5. Intel discovered this error on April 29, 2009, when the
11 unidentified supplier mentioned above notified Intel that it missed
12 the deadline. Craycroft Decl. ¶ 3. Intel then contacted outside
13 counsel and several Defendants to inform them of its intent to opt
14 out and to find the most efficient remedy. On June 19, 2009, Intel
15 contacted Plaintiffs' lead counsel to discuss the issue. Intel
16 then concluded that the instant motion was the best route. On June
17 22, 2009, two and one-half months after the exclusion date, Intel
18 filed its motion to enlarge the time to be excluded from the class.

19 DISCUSSION

20 The standard for determining whether Intel should be allowed
21 to opt out of the class after the applicable deadline is whether
22 its failure to comply with the deadline is the result of "excusable
23 neglect." Fed. R. Civ. P. 6(b)(2). This standard allows courts,
24 "where appropriate, to accept late filings caused by inadvertence,
25 mistake, or carelessness, as well as by intervening circumstances

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27 ²Intel does not state whether it saw the notice in the Wall
28 Street Journal.

beyond the party's control." Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 388 (1993). It is appropriate for courts to accept such late filings when the party's neglect can be considered "excusable," a determination that is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." Id. at 395. The relevant circumstances include "the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in reasonable control of the movant, and whether the movant acted in good faith." Id. Pioneer instructs courts to determine the issue of excusable neglect within the context of the particular case. Pincay v. Andrews, 389 F.3d 853, 859 (9th Cir. 2004).

Intel argues that it made an "honest mistake" due to human error. Reply at 1. Because of "some miscommunications," the deadline to opt out of the class was not calendared, and it missed an unambiguous deadline. Craycroft Decl., ¶ 5. Intel provides no supporting declarations describing these miscommunications or why the deadline was not calendared. Further, if the Court were to accept Intel's vague assertion that deadlines were missed because of "miscommunications," there would be no rational way to draw the line between excusable and non-excusable neglect if other class members in the case sought to opt out.

Intel argues that there is no evidence that its tardiness was part of a strategy to gain a tactical advantage in the case. However, Intel fails to explain why it wants to opt out of the class action, other than because of an agreement it has with an unidentified supplier. Intel also argues that no member of the

1 class will suffer any prejudice or impairment of its claims if
2 Intel is allowed to opt out because there has been no settlement,
3 court ruling or any other development that would be disturbed by
4 Intel opting out. However, the class will suffer prejudice
5 because, since April 6, 2009, Plaintiffs' lead counsel conducted
6 discovery under the assumption that Intel would be a member of the
7 class. For instance, in reviewing Defendants' production of more
8 than 11 million pages of documents, Plaintiffs' lead counsel
9 focused its efforts on locating evidence relating to major
10 purchasers, such as Intel. Plaintiffs' lead counsel has taken
11 approximately one-third of its allotted seventy-five depositions,
12 and has given notice to almost all of the seventy-five witnesses it
13 intends to depose. Plaintiffs' lead counsel has a limited number
14 of depositions that it may take and it has chosen those depositions
15 based upon Intel's membership in the class. Further, the focus of
16 the depositions taken thus far have been on obtaining testimony
17 relating to major purchasers, such as Intel. Plaintiffs' lead
18 counsel has expended significant resources and limited discovery
19 devices pursuing information related to Intel and counsel has made
20 strategic decisions based on the assumption that Intel would remain
21 in the class. Further, fact discovery is scheduled to close in
22 less than two months, on September 4, 2009. Allowing Intel to opt
23 out now would prejudice Plaintiffs.

24 Intel also argues that it acted reasonably and diligently to
25 correct its mistake. After Intel discovered its error on April 29,
26 2009, it retained outside counsel and met and conferred with
27 Defendants to determine if there would be opposition to a delayed
28 opt out. However, Intel waited until June 19, 2009, almost two

1 months, before contacting Plaintiffs' lead counsel about the issue.
2 Further, Intel waited until June 22, 2009 to file this motion --
3 the only obvious solution short of a stipulation of all parties.
4 Overall, Intel's delay belies its argument that it acted reasonably
5 and diligently.

6 The Court notes that, although Intel implies that the class
7 notice was not properly distributed, it does not assert that the
8 notice failed to comply with Federal Rule of Civil Procedure 23 or
9 Due Process. After reviewing the procedures used by Rust and the
10 sample notices submitted to the Court, nothing appears amiss in the
11 notice process.

12 Weighing all of these relevant circumstances, the Court will
13 therefore not allow Intel to enlarge the time to file and serve its
14 written notice of intent to opt out of the certified class.

15 CONCLUSION

16 For the foregoing reasons, Intel's motion for an enlargement
17 of time to opt out of the certified class is DENIED (Docket No.
18 733).

19 IT IS SO ORDERED.

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21 Dated: 08/07/09



22 CLAUDIA WILKEN
23 United States District Judge
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